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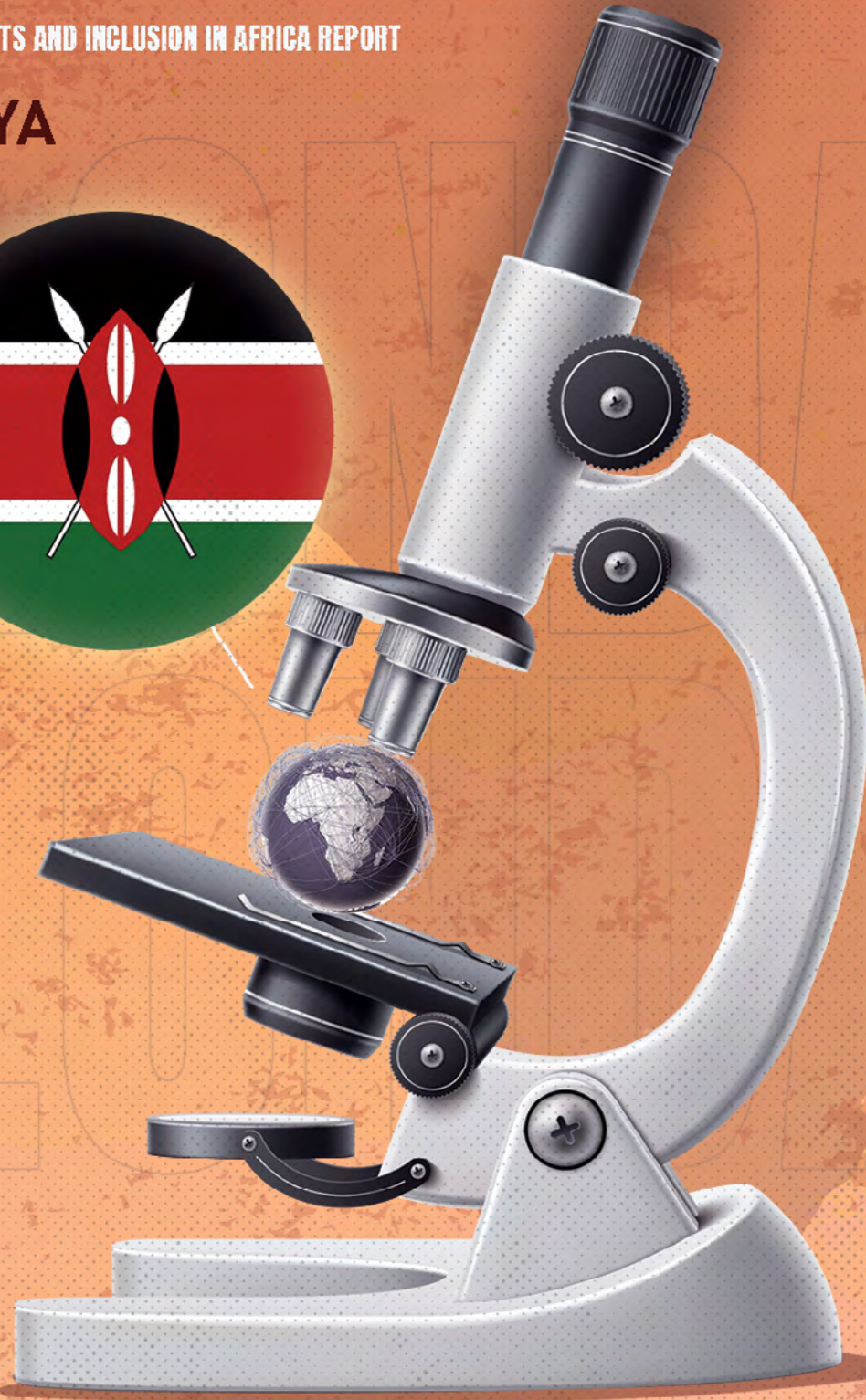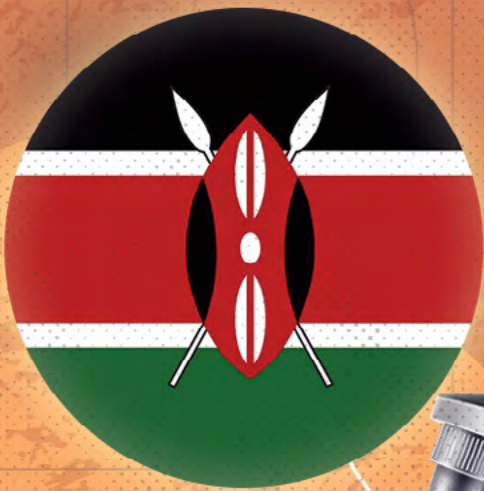
DIGITAL RIGHTS AND INCLUSION IN AFRICA REPORT

KENYA

2022

LONDA

Digital Rights and Inclusion in Africa Report 2022

Kenya

▸ Executive Summary

This report looks at the state of connectivity and digital rights in Kenya in 2022. It divides these issues into several segments and begins assessing internet freedoms in the country. Under internet freedoms, the report gives an enumeration of internet access and disruptions; free speech and media freedoms; privacy and surveillance; SIM card registration; and disinformation and hate speech in Kenya in 2022. The report goes further to look at digital governance where the digital ID system in Kenya, *Huduma Namba*, is largely discussed. In terms of connectivity, the report analyses the Universal Service Fund and provides facts on how the Communications Authority of Kenya (CAK) is using the funds to bridge the digital divide in the country. The report finally looks at developments of ICTs in the country and concludes by providing recommendations on how to avert harms on digital rights and promote digital inclusion in the country.

Country Analysis

INTERNET FREEDOM

INTERNET ACCESS AND DISRUPTIONS

The rate of internet penetration in Kenya has significantly increased. According to the *DataReportal Digital 2022* report, internet penetration in the country stood at 42 per cent as at February 2022.[1] The quarterly report from the Communications Authority of Kenya (CAK), which is the country's ICT Regulator, indicates that mobile (SIM card) subscription, data/internet subscription, and broadband subscription increased significantly during the coverage period where mobile (SIM cards) subscription rose to 65.5 million from 64.7 million from the previous quarter.[2] Data/Internet subscriptions rose to 48.3 million from 47.6 million from the previous financial quarter (Q4 April-June 2022).[3] Mobile broadband subscriptions of 3G and 4G networks also saw a significant increase during the coverage period where it stood at 30.9 million.[4] The annual report from CAK also indicates that internet subscriptions for the financial year 2020-2021 rose to 46.7 million.[5]

These statistics indicate that the country is making progress towards internet penetration. However, the exact number of internet users in the country is unknown.[6] There are no statistics on the number of people currently using the internet. Reports from CAK on internet users contain figures which do not reflect the correct position in the country. The figures in the reports tend to be flawed/inaccurate and the methodology adopted in arriving at the figures has been questioned a number of times.[7]

In 2019, the Authority reported that there were

1   DATAREPORTAL 'Digital 2022: Kenya' (2022) https://datareportal.com/reports/digital-2022-kenya#:~:text=Data%20show%20that%20Kenya's%20population,percent%20lived%20in%20rural%20areas (accessed on December 15, 2022)

2   Communications Authority of Kenya "Sector Statistics Report Q1 2022-2023" (Q1 July-Sept 2022) https://www.ca.go.ke/wp-content/uploads/2022/11/Sector-Statistics-Report-Q1-2022-2023.pdf (accessed on December 16, 2022).

3   Communications Authority of Kenya "Sector Statistics Report Q1 2022-2023" (Q1 July-Sept 2022) ix https://www.ca.go.ke/wp-content/uploads/2022/11/Sector-Statistics-Report-Q1-2022-2023.pdf (accessed on December 16, 2022).

4   Communications Authority of Kenya, Sector Statistics Report Q1 2022-2023 (Q1 July-Sept 2022) ix https://www.ca.go.ke/wp-content/uploads/2022/11/Sector-Statistics-Report-Q1-2022-2023.pdf (accessed on 16/12/2022).

5   Communications Authority of Kenya "Annual Report 2021" (2021) 26 https://www.ca.go.ke/wp-content/uploads/2023/01/Annual-Report-for-Financial-Year-2020-2021.pdf (accessed on January 18, 2023).

6   How Many Internet Users Are In Kenya? https://www.businessdailyafrica.com/bd/corporate/technology/how-many-internet-users-are-in-kenya--2184930

7   Business Daily 'How Many Internet Users Are In Kenya?' (2018) https://www.businessdailyafrica.com/bd/corporate/technology/how-many-internet-users-are-in-kenya--2184930 (accessed on 17/12/2022).

UNESCO "Assessing Internet Development in Kenya: Using UNESCO's Internet Universality ROAM-X Indicators" (2020) 86 https://unesdoc.unesco.org/ark:/48223/pf0000374684 (accessed on December 17, 2022).

97 per cent internet users in Kenya.[8] In 2017 it also reported that internet penetration in the country had reached 112 per cent.[9] This, when analysed, means that the country had 51.1 million internet users[10] which is unrealistic given that the country's population at the time was 45 million.[11] The Authority is said to have arrived at these figures by "counting one internet user for every mobile data subscription"[12] instead of counting individual internet users. This method is bound to produce incorrect and distorted figures because individuals can have "multiple devices with multiple SIM cards".[13]

The only government report that has accurate figures on this is the 2019 Kenya National Bureau of Statistics (KNBS) census report.[14] This report indicates that out of a population of 43,739,906 (aged three and above), only 9,869,962 were using the internet. Meaning that only 22.6 per cent of Kenyans were using the internet in 2019.[15]

Other than the 2019 national census report there is no government report providing credible information on internet use in the country. The only reports that provide this information are from organisations such as the ITU and the GSMA. The ITU Global Connectivity report of 2022 shows that the percentage of internet use in Kenya in 2020 ranged between 20 per cent and 40 per cent.[16] The ITU DataHub portal on the other hand shows that only 30 per cent of individuals were using the internet in 2020.[17] The *After Access Survey 2018* by Research ICT Africa shows that the percentage of internet use in 2018 was 27 per cent.[18] These figures correlate with the statistics in Kenya's 2019 census report.

The lack of information on the state of internet connectivity in the country leaves a gap in terms of evidence-based facts that the government can rely on in formulating policies and strategies on internet connection. It leaves the government without information that can be used in formulating practical strategies around connectivity.[19] The government needs to have actual and reliable figures.

8   UNESCO "Assessing Internet Development in Kenya: Using UNESCO's Internet Universality ROAM-X Indicators" (2020) 86
https://unesdoc.unesco.org/ark:/48223/pf0000374684 (accessed on December 17, 2022).
9   Business Daily 'How Many Internet Users Are In Kenya?' (2018)
https://www.businessdailyafrica.com/bd/corporate/technology/how-many-internet-users-are-in-kenya--2184930 (accessed on December 17, 2022).
10   Business Daily 'How Many Internet Users Are In Kenya?' (2018)
https://www.businessdailyafrica.com/bd/corporate/technology/how-many-internet-users-are-in-kenya--2184930 (accessed on December 17, 2022).
11   Business Daily 'How Many Internet Users Are In Kenya?' (2018)
https://www.businessdailyafrica.com/bd/corporate/technology/how-many-internet-users-are-in-kenya--2184930 (accessed on December 17, 2022).
12   Business Daily 'How Many Internet Users Are In Kenya?' (2018)
https://www.businessdailyafrica.com/bd/corporate/technology/how-many-internet-users-are-in-kenya--2184930 (accessed on December 17, 2022).
13   UNESCO "Assessing Internet Development in Kenya: Using UNESCO's Internet Universality ROAM-X Indicators" (2020) 86
https://unesdoc.unesco.org/ark:/48223/pf0000374684 (accessed on December 17, 2022).
14   KNBS "2019 Kenya Population and Housing Census Volume IV: Distribution of Population by Socio-Economic Characteristics" (2020) 432
https://www.knbs.or.ke/download/2019-kenya-population-and-housing-census-volume-iv-distribution-of-population-by-socio-economic-characteristics/ (accessed on December 16, 2022).
15   KNBS "2019 Kenya Population and Housing Census Volume IV: Distribution of Population by Socio-Economic Characteristics" (2020) 432
https://www.knbs.or.ke/download/2019-kenya-population-and-housing-census-volume-iv-distribution-of-population-by-socio-economic-characteristics/ (accessed on December 16, 2022).
16   ITU "Global Connectivity Report 2022" (2022) 24
https://www.itu.int/hub/publication/d-ind-global-01-2022/ (accessed on 17/12/2022).
17   ITU 'DataHub'
https://datahub.itu.int/ (accessed on December 17, 2022).
18   After Access Survey 'The Inside Internet Story of Africa, Asia, and Latin America' (2018)
https://afteraccess.net/wp-content/uploads/After-Access-Website-layout-r1.pdf (accessed on December 18, 202).
19   After Access Survey 'The Inside Internet Story of Africa, Asia, and Latin America' (2018)
https://afteraccess.net/wp-content/uploads/After-Access-Website-layout-r1.pdf (accessed on December 18, 2022).

1.1.1. DISRUPTIONS

The country did not experience any shutdown during the coverage period and during the general elections. Countries in Africa are known to be notorious for shutting down the internet during such critical periods. The Minister of ICT assured Kenyans that social media platforms would not be shut down ahead of the general elections. This came after the National Cohesion and Integration Commission (NCIC), which is the ethics body in the country, threatened to suspend Facebook for failing to deal with hate speech on its platform. The threat was informed by a Global Witness report that showed that Facebook had failed to take

down content that contained hate speech on its platform.[20]

1.2. FREE SPEECH AND MEDIA FREEDOMS

The legal framework on hate speech and disinformation in the country poses a threat to free speech and media freedoms. The application of the laws has been found to be limiting the freedom of expression on numerous occasions. The law that establishes the offence of hate speech - The National Cohesion and Integration Act of 2008 (NCIC Act)[21], gives it a broad definition which leaves room for misapplication and misinterpretation by the government. The law indicates that hate speech includes the use of threatening, abusive, or insulting words or behaviour.[22]

This definition in itself is vague and has given the government room to suppress free speech. Based on this law, the Commission established under it, The National Cohesion and Integration Commission (NCIC), outlawed a number of words that were actively being used by politicians during the campaign period on grounds that they constituted hate speech and had the potential of causing ethnic violence.[23] The words in question included *kihii* (uncircumcised)*, madoadoa (*spots), *kama noma noma* (no matter what), *hatupangwingwi* (can't tell me nothing), *chunga kura* (guard the vote)" among others.[24]

Hatupangwingwi for example was a slogan used by the then Presidential Candidate William Samoei Ruto and his political party Kenya Kwanza Coalition "as a show of defiance and to urge their supporters to reject alleged schemes by powerful figures to impose leaders". [25]

20   Global Witness 'Facebook Unable to Detect Hate Speech Weeks Away from the Tight Kenyan Election' (2022) https://www.globalwitness.org/en/campaigns/digital-threats/hate-speech-kenyan-election/ (accessed on 20/12/2022).

21   National Cohesion and Integration Act, 2008 (No.12 of 2008).

22   Section 13, National Cohesion and Integration Act 2008.

23   Nation 'NCIC Outlaws 'Outlaws Sipangwingwi' In War on Hate Speech' (2022) https://nation.africa/kenya/news/ncic-blacklists-sipangwingwi-in-war-on-hate-speech-3775900 (accessed on December 18, 2022).

24   Citizen Digital 'Hatupangwingwi, Mende, Chunga Kura Among Words Declared As Hate Speech By NCIC' (2022) https://www.citizen.digital/news/ncic-launches-lexicon-of-terms-considered-hate-speech-n296054 (accessed on January 18, 2023).

Pulse Live 'NCIC Outlaws 21 Words Ahead of 2022 General Election' (2022) https://www.pulselive.co.ke/news/ncic-releases-list-of-words-it-has-banned-ahead-of-the-elections/x0z2f53 (accessed on December 22, 2022).

25   Nation 'NCIC Outlaws 'Outlaws Sipangwingwi' In War on Hate Speech' (2022) https://nation.africa/kenya/news/ncic-blacklists-sipangwingwi-in-war-on-hate-speech-3775900 (accessed on December 22, 2022).

The NCIC indicated that the words had the potential of fuelling ethnic violence and causing political tension during the elections.[26] The words when assessed had no such effect and their active ban had the potential of limiting free speech.

During the same year (July 2022), the NCIC based on an investigation conducted by the Global Witness revealing Facebook's failure to take down political advertisements that constituted hate speech ahead of the elections, threatened to suspend Facebook in an effort to deal with hate speech on the platform.[27] [28]

The Ministry of Information Communication Technologies (ICT) however clarified that Facebook and other social media platforms would not be blocked during the elections.[29]

In May 2022, Twitter suspended 22 accounts belonging to activists that actively campaigned against the massive increase in food prices in the country.[30] The campaign #NjaaRevolution which had been started at a time when inflation had badly hit the country, and the cost of living had become unbearable, raised significant issues on the governance of the country.[31] It was unclear why Twitter deactivated these accounts and what the motive was.

1.3. PRIVACY AND SURVEILLANCE

The Data Protection law in Kenya was enacted in 2019[32] with the main objective of protecting personal data and equipping data subjects with rights towards their data.[33] The law applies to both automated and non-automated processing of personal data.[34] The Data Protection Commissioner established under the law was appointed in 2020. To give effect to the provisions of the Data Protection Act and the mandate of the Data Protection Commissioner, the data protection Regulations were enacted in 2022.

The Regulations include the Data Protection (General) Regulations 2021[35], the Data Protection (Compliance and Enforcement) Regulations, 2021[36], and the Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021[37]. The enactment of these laws has ushered in the regulatory framework of privacy and data protection in Kenya and has seen a revision of laws and a move by organisations taking measures such as registration as data controllers and data processors to comply. The Central Bank of Kenya Act[38], for example, was revised to "require digital lending apps to be registered with the ODPC, failing which, they would be denied the necessary licence for their business from the Central Bank".[39]

However, despite the move by organisations registering as data controllers and data

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26   Nation 'NCIC Outlaws 'Outlaws Sipangwingwi' In War on Hate Speech' (2022) https://nation.africa/kenya/news/ncic-blacklists-sipangwingwi-in-war-on-hate-speech-3775900 (accessed on 22/12/2022).

27   Global Witness 'Facebook Unable to Detect Hate Speech Weeks Away from the Tight Kenyan Election' (2022) https://www.globalwitness.org/en/campaigns/digital-threats/hate-speech-kenyan-election/ (accessed on 20/12/2022).

28   Global Witness 'Facebook Unable to Detect Hate Speech Weeks Away from the Tight Kenyan Election' (2022) https://www.globalwitness.org/en/campaigns/digital-threats/hate-speech-kenyan-election/ (accessed on 20/12/2022).

29   Twitter https://twitter.com/i/web/status/1553271302005334016 (accessed on 20/12/2022).

30   Article 19 'Kenya: Twitter Must Stop Silencing Human Rights Defenders' (2022) https://www.article19.org/resources/kenya-twitter-stop-silencing-activist-voices/ (accessed on 20/12/2022). Twitter https://twitter.com/Maskani254/status/1530136075276107776 (accessed on December 20, 2022).

31   Article 19 'Kenya: Twitter Must Stop Silencing Human Rights Defenders' (2022) https://www.article19.org/resources/kenya-twitter-stop-silencing-activist-voices/ (accessed on December 20, 2022).

32   Data Protection Act, 2019 (Act No.24 of 2019).

33   Data Protection Act, 2019 (Act No.24 of 2019).

34   Section 4, Data Protection Act, 2019.

35   The Data Protection (General) Regulations, 2021.

36   The Data Protection (Compliance and Enforcement) Regulations, 2021.

37   The Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021.

38   The Central Bank of Kenya Act, 1966 (Chapter 491 of the Laws of Kenya).

39   Mondaq 'Kenya: Data Protection Registration Law Comes into Force on July 14, 2022' (2022) https://www.mondaq.com/data-protection/1216300/data-protection-registration-law-comes-into-force-on-14-july-2022 (accessed on December 21, 2022).

processors, it has been observed that some of them do not take any measures towards compliance with the Data Protection Act past registration.[40] Some actions by organisations (including government bodies) during the coverage period have been found to be in blatant disregard to the provisions of the Data Protection Act. In May 2022, Kenya Revenue Authority (KRA) announced that it was planning to adopt a software that would enable it to harvest data from the digital devices of taxpayers in an effort to curb tax fraud.[41] This together with the amendment to the *Huduma Namba* Bill that aims at granting KRA sensitive taxpayers data in the National Integrated Identity Management System (NIIMS) database is a clear contravention to citizens' privacy and data protection rights.

During the recently concluded elections, *KICTANet,* an ICT think tank in Nairobi, observed data protection practices by the Independent Electoral and Boundaries Commission (IEBC) which is the body mandated by the Constitution to oversee elections in the country. Among the things noted by *KICTANet* towards this end was development of an Election Guidance Note

meant to guide data controllers and processors in handling voters data.[42] The think tank also noted the failure of the Commission to publish its alleged Data Protection Impact Assessment and privacy policy.[43]

In early 2022, Safaricom, which is the leading telco in Kenya, was sued in a class action lawsuit where it was found to have breached the privacy rights of its subscribers. In the suit, two of the telcos employees leaked the data of millions of subscribers and circulated it to unwanted parties contrary to the Data Protection Act.[44]

1.4. SIM CARD REGISTRATION

Earlier in February 2022, leading telecom operators in Kenya, Safaricom, Airtel and Telecom[45], called on subscribers to re-register their lines. This was in line with the order from CAK which indicated that it was undertaking the exercise to combat crime and clean up subscribers' data.[46] The CAK threatened subscribers who would not have registered their lines by the set deadline that their lines would be switched off and that they would be

40   KICTANet 'Data Protection, Three Years Later - The Good, The Bad, and The Ugly' (2022) https://www.kictanet.or.ke/data-protection-three-years-later-the-good-the-bad-and-the-ugly/ (accessed on December 21, 2022).

41   QUARTZ 'Kenyans Are Protesting Plans by Tax Authority to Snoop on Their Online Chats' (2022) https://qz.com/africa/2164861/kenyas-tax-authority-to-snoop-on-online-chats-to-combat-fraud (accessed on December 17, 2022).
Nation 'KRA In Plan To Snoop on Your WhatsApp Chats' (2022) https://nation.africa/kenya/business/kra-in-plan-to-snoop-on-your-whatsapp-chats-3811392 (accessed on December 17, 2022).

42   KICTANet 'Safeguarding Personal Data During Kenya's 2022 General Elections' (2022) https://www.kictanet.or.ke/safeguarding-personal-data-during-kenyas-2022-general-election/ (accessed on December 22, 2022).

43   KICTANet 'Safeguarding Personal Data During Kenya's 2022 General Elections' (2022) https://www.kictanet.or.ke/safeguarding-personal-data-during-kenyas-2022-general-election/ (accessed on December 21, 2022).

44   https://web.archive.org/web/20210207124248/https://twitter.com/KinyanBoy/status/1358395467462279175 (accessed on 22/12/2022).
Access Now 'Data Protection in Kenya: How Is This Right Protected?' (2021) 8
https://www.accessnow.org/cms/assets/uploads/2021/10/Data-Protection-in-Kenya.pdf (accessed on December 23, 2022).

45   Airtel SIM Registration https://www.airtelkenya.com/customer-registration (accessed on December 23, 2022).
Safaricom SIM Registration https://www.youtube.com/watch?v=_EdJ3BJ8V3I (accessed on December 23, 2022).
Telkom SIM Registration https://twitter.com/TelkomKenya/status/1509875650483556358?s=20&t=YJeyGd_1z7D49H4i-zIGzA (accessed on December 23, 2022).

46   The Star 'CA To Switch Off Unregistered SIM Cards By April 15' (2022) https://www.the-star.co.ke/business/kenya/2022-03-07-ca-to-switch-off-unregistered-sim-cards-by-april-15/ (accessed on December 23, 2022).

fined Ksh.300,000 or jailed for six months.[47]

It is important to note that, registration of SIM subscribers is a legal requirement provided for under the Kenya Information and Communications (Registration of SIM cards) Regulations, 2015[48]. The law provides that telecom operators should register their existing and new subscribers[49] and provides a list of information that should be collected from subscribers during the registration exercise.[50] These include: "full names, identity card/passport number, date of birth, gender, physical address, postal address, an original and copy of the national identity card/passport, an original and a copy of the birth certificate in respect to minors..."[51]

During the registration exercise, telecom operators such as Safaricom and Airtel were, however, on record collecting biometric data such as people's photographs and signatures.[52] The telcos indicated that this was being collected for "additional security".[53] The collection of biometric data such as photographs was not in line with the Regulations and was a contravention of people's constitutional right to privacy. This was brought to the CAK's attention and it issued a statement rectifying the information that should be collected from subscribers.[54]

Following this, leading telco Safaricom revised its terms and indicated that subscribers would no longer be required to provide their photos during the registration exercise; however, Airtel continued to collect photographs.[55] This exercise was flawed and illegal in its entirety. It was a contravention of the Data Protection Act, 2019 which was enacted with the main objective of protecting personal data.

The Act provides for principles which should govern such activities. These include principles of lawfulness, fairness, and transparency.[56] First, it was not clear why people were being asked to re-register their lines.[57] There was a vacuum of information on what informed the re-registration exercise thus subscribers were

47   The Star 'CA To Switch Off Unregistered SIM Cards By April 15' (2022) https://www.the-star.co.ke/business/kenya/2022-03-07-ca-to-switch-off-unregistered-sim-cards-by-april-15/ (accessed on 23/12/2022).

48   Kenya Information and Communications (Registration of SIM Cards) Regulation 2015.

49   Section 3, Kenya Information and Communications (Registration of SIM Cards) Regulation 2015

50   Section 5, Kenya Information and Communications (Registration of SIM Cards) Regulation 2015

51   Section 5, Kenya Information and Communications (Registration of SIM Cards) Regulation 2015

52   Airtel SIM Registration https://www.airtelkenya.com/customer-registration (accessed on December 23, 2022). Safaricom SIM Registration https://www.youtube.com/watch?v=_EdJ3BJ8V3I (accessed on December 23, 2022).

53   Airtel SIM Registration https://www.airtelkenya.com/customer-registration (accessed on December 23, 2022). Safaricom SIM Registration https://www.youtube.com/watch?v=_EdJ3BJ8V3I (accessed on December 23, 2022).

54   Twitter https://twitter.com/CA_Kenya/status/1513139749380308992/photo/3 (accessed on December 23, 2022).

55   Access Now 'Why Kenyans Should Say No To Biometrics For SIM Card Registry' (2022) https://www.accessnow.org/kenya-sim-card-biometrics/ (accessed on December 23, 2022).

56   Section 25, Data Protection Act 2019.

57   M.Laibuta 'Why SIM Card Re Registration Is A Flawed Process' (2022) https://www.laibuta.com/data-protection/why-sim-card-re-registration-is-a-flawed-process/ (accessed on December 23, 20222).

reluctant to re-register their lines.[58] There was also apprehension given that this was an electioneering period and there were all manner of narratives on why the government was collecting data.[59]

In line with the principle of fairness, the CAK should have explained in detail to subscribers why the exercise was being conducted and why their data was being collected.[60] Secondly, the Authority's move of threatening to switch off lines that were not re-registered was a contravention of their data protection rights as the registration involved the collection of data that was not in line with the law and subscribers were not given room to object to this.[61]

Following this, Safaricom has not deleted subscribers' photographs.[62] The telco has been called out by civil society organisations but no action has been taken by them.[63] The collection of sensitive data is governed by the Data Protection Act which provides grounds for its processing. The move by telecommunication operators makes subscribers susceptible "in cases of data breach and identity theft".[64]

1.5. DISINFORMATION

Disinformation has been rife on social media platforms in Kenya. Various actors including politicians, political parties, and their supporters have resorted to use it to push political agendas and influence public opinion.[65] Politicians and political parties mostly rely on paid individuals known as influencers who push their agenda to the public with the intent of swaying opinions.[66] The influencers contacted for this purpose study the public, profile them and target them with information likely to sway them towards a certain decision.[67]

In 2021, the former President of Kenya Uhuru Kenyatta, was implicated in the *Pandora Papers*, a publication by the international consortium of investigative journalists that exposed offshore wealth of global leaders.[68] According to a report published by Mozilla, the government leveraged Twitter to change

58   M.Laibuta 'Why SIM Card Re Registration Is A Flawed Process' (2022) https://www.laibuta.com/data-protection/why-sim-card-re-registration-is-a-flawed-process/ (accessed on December 23, 20222).

59   M.Laibuta 'Why SIM Card Re Registration Is A Flawed Process' (2022) https://www.laibuta.com/data-protection/why-sim-card-re-registration-is-a-flawed-process/ (accessed on December 23, 2022).

60   M.Laibuta 'Why SIM Card Re Registration Is A Flawed Process' (2022) https://www.laibuta.com/data-protection/why-sim-card-re-registration-is-a-flawed-process/ (accessed on December 23, 2022).
Business Daily 'Address Personal Data Concerns Dragging SIM Card Registration' (2022) https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/address-personal-data-concerns-dragging-sim-card-registration-3980920 (accessed on December 24, 2022).

61   M.Laibuta 'Why SIM Card Re Registration Is A Flawed Process' (2022) https://www.laibuta.com/data-protection/why-sim-card-re-registration-is-a-flawed-process/ (accessed on December 24, 2022).

62   Access Now 'Stop SIM Data Siphoning: Safaricom Must Protect Privacy In Kenya' (2022) https://www.accessnow.org/safaricom-privacy-kenya/ (accessed on December 24, 2022).

63   Access Now 'Stop SIM Data Siphoning: Safaricom Must Protect Privacy In Kenya' (2022) https://www.accessnow.org/safaricom-privacy-kenya/ (accessed on December 24, 2022).

64   Access Now 'Why Kenyans Should Say No To Biometrics For SIM Card Registry' (2022) https://www.accessnow.org/kenya-sim-card-biometrics/ (accessed on December 24, 2022).

65   CIPESA "Disinformation in Kenya's Political Sphere: Actors, Pathways, and Effects" (2022) 11 https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them (accessed on December 24, 2022).

66   CIPESA "Disinformation in Kenya's Political Sphere: Actors, Pathways, and Effects" (2022) 11 https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them (accessed on December 21, 2022).

67   CIPESA "Disinformation in Kenya's Political Sphere: Actors, Pathways, and Effects" (2022) 11 https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them (accessed on December 21, 2022).

68   ICIJ 'Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak' (2021) https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/ (accessed on 24/12/2022).

the narrative and to change the perception of Kenyans towards the then President.[69]

In 2022, Mozilla unearthed how Tik Tok was used to spread political disinformation ahead of the elections .[70] Also in the same year, Mozilla reported how an organisation based in Spain, CitizenGo, spread disinformation on reproductive health in Kenya.[71] This happened at a time when the country was having important debates on legislation governing surrogacy and reproductive health.[72]

Recently, during the Constitutional Review Process (the Building Bridges Initiative), influencers were paid to sway the public opinion on Twitter in favour of the Constitutional amendment and attack civil society, activists, and the Judiciary (judges) who were against it.[73]

During the 2022 elections, there was the rampant circulation of fake news. On the eve of the elections, for example, a fake pamphlet alleged to be from the Kenya Wildlife Services (KWS) was in circulation on social media platforms warning residents in a given area about wild animals on the loose.[74] The area in question was known to be the 'political hotbed' of one of the presidential candidates and the pamphlet was intended to create fear among residents and to suppress voter turnout in that particular area. Supporters of political parties and influencers were also seen circulating information about winning candidates which was untrue.[75] There were also claims that the country's electoral body, the Independent Electoral and Boundaries Commission (IEBC), had erroneously added votes in favour of one of the presidential candidates, Raila Odinga.[76]

During the vote tallying process by the IEBC, videos emerged online of presidential candidate Raila Odinga conceding defeat to his opponent William Ruto. The video was checked by the Agence France-Presse (AFP) Fact Check[77], an independent third-party fact checker, and turned out to be untrue.[78] The video had been altered and was in fact a 2013 video showing Raila Odinga conceding defeat to Uhuru Kenyatta.[79]

The spread of disinformation on social media platforms such as Twitter is made possible through the trending algorithm where many

69   Mozilla "How To Manipulate Twitter And Influence People: Propaganda And The Pandora Papers in Kenya" (2021) 5 https://assets.mofoprod.net/network/documents/Pandora_Disinfo_Report_2__hcc.pdf (accessed on December 24, 2022).

70   O.Madung "From Dance App To Political Mercenry: How Disinformation on Tik Tok Gaslights Political Tensions In Kenya" (2022) https://foundation.mozilla.org/en/blog/new-research-disinformation-on-tiktok-gaslights-political-tensions-ahead-of-kenyas-2022-elections/ (accessed on December 24, 2022).

71   O.Madung "Exporting Disinformation: How Foreign Groups Peddle Influence In Kenya Through Twitter" (2021) https://foundation.mozilla.org/en/campaigns/exporting-disinformation-how-foreign-groups-peddle-influence-in-kenya-through-twitter/ (accessed on December 24, 2022).

72   O.Madung "Exporting Disinformation: How Foreign Groups Peddle Influence In Kenya Through Twitter" (2021) https://foundation.mozilla.org/en/campaigns/exporting-disinformation-how-foreign-groups-peddle-influence-in-kenya-through-twitter/ (accessed on December 24, 2022).

73   O.Madung "Exporting Disinformation: How Foreign Groups Peddle Influence In Kenya Through Twitter" (2021) https://foundation.mozilla.org/en/campaigns/exporting-disinformation-how-foreign-groups-peddle-influence-in-kenya-through-twitter/ (accessed on December 24, 2022).

74   Article 19 'Kenya: Tackling Misinformation is Critical for Electoral Integrity' (2022) https://www.article19.org/resources/kenya-tackling-misinformation-critical-electoral-integrity/ (accessed on December 23, 2022).

75   Article 19 'Kenya: Tackling Misinformation is Critical for Electoral Integrity' (2022) https://www.article19.org/resources/kenya-tackling-misinformation-critical-electoral-integrity/ (accessed on December 23, 2022).

76   Twitter https://twitter.com/i/events/1537125015426019328?t=oZIjsshEFWUlOl2jLaHuBQ&s=08 (accessed on December 10, 2022).

77   Agence France-Presse (AFP) Fact Check https://factcheck.afp.com/

78   Twitter https://twitter.com/i/events/1537125015426019328?t=oZIjsshEFWUlOl2jLaHuBQ&s=08 (accessed on December 10, 2022).

79   Twitter https://twitter.com/i/events/1537125015426019328?t=oZIjsshEFWUlOl2jLaHuBQ&s=08 (accessed on December 10, 2022).

Twitter accounts tweet on the same subject using specific hashtags that give them amplification on the platform.[80] It poses a significant risk to a fragile democracy like Kenya which witnessed post-election violence in 2007 propagated by ethnic hatred in the online and physical realm. It also fuels ethnic tension which borders heavily with politics in the country and tightens the government's grip on disinformation which as a result leads to the enactment of laws that undermine rights such as freedom of expression. It denies people access to credible information needed in making informed decisions and populates online platforms with lies which as a result acts to the detriment of online users who lack the capacity to discern whether the information is true or false.

DATA GOVERNANCE

Kenya has been keen on introducing a digital ID system which citizens can use to access government services. This has mainly been through the *Huduma Namba* system which was first introduced by the government in 2019. The system includes the National Integrated Identity Management System (NIIMS) database on which it is built.[81] The NIIMS database contains citizens' personal data including biometric data such as facial images and fingerprints. The database will "be a primary source for both foundational and functional data, from which every other database with personal data of residents in Kenya, such as databases of voters, taxes, and social services will be built".[82]

Citizens will require *Huduma Namba* to access government services including acquiring passports, land titles, and SIM card registration. The *Huduma Namba* Bill, that introduces the

Huduma Namba system, has been strongly opposed by civil society organisations in Kenya and the citizens at large on grounds that it puts the privacy and data protection rights of citizens at risk due to the intensity of data processed by the system, and also the fact that its requirement as a prerequisite for access to government services stands to exclude millions of Kenyans who lack the necessary ID documents to be registered into the system.

The government introduced major amendments to the Bill in 2021 which make *Huduma Namba* crucial in key government departments. The amendments in question include; replacing the national identity card (ID) with the *Huduma Namba* card as an identification document, placing a fine of Ksh10,000 to those who fail to register for *Huduma Namba*, granting the Kenya Revenue Authority (KRA) access to the NIIMS database (people's biometric data) for purposes of combating tax fraud and increasing its tax base, and requiring the Independent Electoral and Boundaries Commission (IEBC) to use *Huduma Namba* in "drawing up the national register".[83]

These amendments make *Huduma Namba* central in key government areas and grant the government department access to people's sensitive information. The amendments in the Bill were supposed to come up for Third Reading in Parliament in July 2022 but the special sitting was cancelled by the Speaker of the National Assembly on grounds that the government printer had failed to publish a gazette notice on the proceedings.[84]

In October 2021, the issuance of the *Huduma Namba* card by the government was halted by the Judiciary which found the exercise illegal

80   O.Madung "Inside The Shadowy World of Disinformation For Hire In Kenya" (2021) 6 https://assets.mofoprod.net/network/documents/Report_Inside_the_shadowy_world_of_disinformation_for_hire_in_Kenya_5._hcc.pdf (accessed on December 23, 2022).

81   Huduma Namba
https://www.hudumanamba.go.ke/

82   BIOMETRICUPDATE.COM 'Kenya Pushes On With Huduma Namba As Compulsory Digital ID Amidst Controversy' (2022) https://www.biometricupdate.com/202201/kenya-pushes-on-with-huduma-namba-as-compulsory-digital-id-amid-controversy (accessed on 26/12/2022).

83   BIOMETRICUPDATE.COM 'Kenya Parliament Schedules, Cancels Debate On Huduma Namba Digital ID' (2022) https://www.biometricupdate.com/202207/kenya-parliament-schedules-cancels-debate-on-huduma-namba-digital-id (accessed on December 26, 2022).

84   BIOMETRICUPDATE.COM 'Kenya Parliament Schedules, Cancels Debate On Huduma Namba Digital ID' (2022) https://www.biometricupdate.com/202207/kenya-parliament-schedules-cancels-debate-on-huduma-namba-digital-id (accessed on December 26, 2022).

and in contravention of the Data Protection Act.[85] The Judiciary ordered the government to conduct a Data Protection Impact Assessment (DPIA) in line with the Data Protection Act of Kenya 2019.[86]

REVIEW OF THE UNIVERSAL SERVICE FUND

The Universal Service Fund was established by the Kenya Communications (Amendment) Act, 2009.[87] The fund is administered by the CAK with oversight of the Universal Service Advisory Council.[88] The Fund has been established with the main aim of bridging the digital divide in the country through building capacity, enabling access to ICTs and promoting innovation in ICTs.[89]

In 2016, CAK undertook an ICT Access Gap study that identified connectivity and access gaps in the country and designed USF projects that would address these gaps.[90] The study discovered 348 sub-locations that lacked telecommunication services in the country and designed projects and allocated portions of the USF.[91] One of the projects designed under the study was the Education Broadband Connectivity Project which was designed to provide high speed internet connectivity to public secondary schools, and the "mobile network project" which was designed to provide mobile communications in parts of the country that lacked such.[92]

The country has been keen on implementing these projects over the years. The projects are being implemented in phases. The first phase saw the CAK provide internet connectivity to

884 public secondary schools in 47 counties, and mobile connectivity to 78 sub-locations in 15 counties.[93] The second phase is currently being implemented by the Authority on the mobile network project where it is keenly looking into connecting "101 unserved and underserved sub-locations" across the

85   BIOMETRICUPDATE.COM 'Kenya Parliament Schedules, Cancels Debate On Huduma Namba Digital ID' (2022) https://www.biometricupdate.com/202207/kenya-parliament-schedules-cancels-debate-on-huduma-namba-digital-id (accessed on December 26, 2022).

86   BIOMETRICUPDATE.COM 'Kenya Pushes On With Huduma Namba As Compulsory Digital ID Amidst Controversy' (2022) https://www.biometricupdate.com/202201/kenya-pushes-on-with-huduma-namba-as-compulsory-digital-id-amid-controversy (accessed on December 26, 2022).

87   Kenya Information and Communications Act, 2011 (Chapter 411A).

88   Section 102 A, Kenya Information Communications Act, 2011.

89   Section 84J (2), Kenya Information Communications Act, 2011.

90   Communications Authority of Kenya "ICT Access Gaps Study" (2016) v https://www.ca.go.ke/wp-content/uploads/2018/02/ICT-Access-Gaps-Report-April-2016-.pdf (Accessed on December 20, 2022)

91   Communications Authority of Kenya "Opportunities and Challenges of Using the Universal Service Fund" https://www.itu.int/en/ITU-D/Conferences/WTDC/WTDC17/RPM-AFR/Documents/presentations/USF_Challenges_and_Opportunities_Kenyan_Experience.pdf (Accessed on December 20, 2022)

92   Phase II Of Universal Service Fund Launched In West Pokot (2022) https://sokodirectory.com/2022/04/phase-ii-of-universal-service-fund-launched-in-west-pokot/ (Accessed on December 20, 2022)

93   Phase II Of Universal Service Fund Launched In West Pokot (2022) https://sokodirectory.com/2022/04/phase-ii-of-universal-service-fund-launched-in-west-pokot/ (Accessed on December 20, 2022).
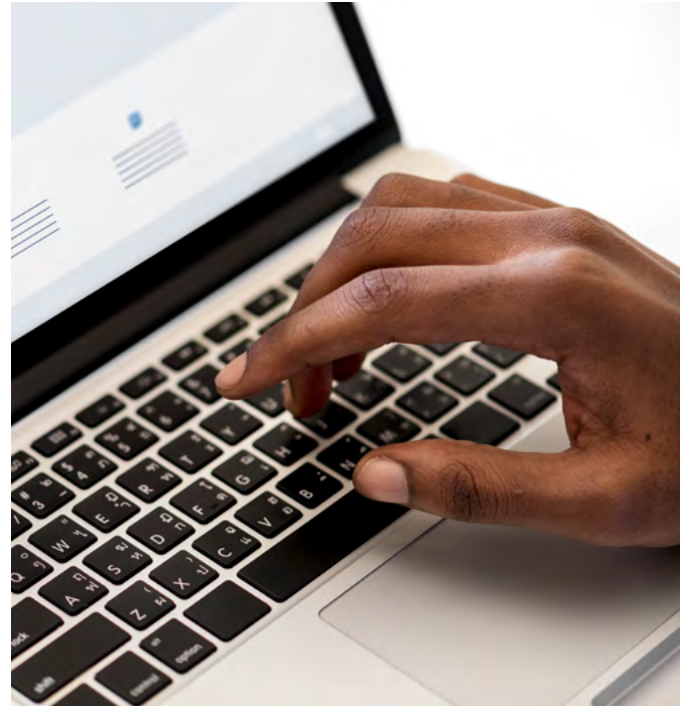
country.[94] Out of the 101 sub-locations, 20 have so far had 20 sites deployed with 15 being active.[95] The launch of the second phase of the USF projects went live in April 2022.[96]

The Authority also announced in 2021 its plan to spend Ksh.5 billion for the purpose of implementing the 3rd, 4th, and 5th phases of the USF projects to provide voice and data services to "unserved and underserved" populations "for five years from the financial year 2022/23".[97] In utilising the Funds, the Authority drafted the USF 2022-2026 Strategic Plan, which is still a draft, to steer the achievement of the USF goals.[98] The Strategy which looks into the implementation of the USF for the subsequent five years, lays out plans which include "the rollout of infrastructure and services to close the remaining gaps...; Digital Skills and Content to enhance ICT impact; and Institutional Capacity to enhance administration and management of USF to effectively and efficiently execute projects envisaged in the Strategic Plan".[99]

DEVELOPMENTS IN ICTS AND EMERGING TECHNOLOGIES

In April 2022, the Ministry of ICT launched the 2022-2032 Kenya Digital Masterplan.[100] The ten-year Masterplan aims at leveraging ICTs to boost the country's digital economy and putting it at a competitive advantage globally.[101] It has been developed with an integral focus in four key pillars – Digital Infrastructure and Digital Government Service; Product and

Data Management; Digital Skills; and Digital Innovation, Enterprise, and Digital Business.[102] The Master Plan identifies several flagship projects aligned with positioning the country as

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94   Phase II Of Universal Service Fund Launched In West Pokot (2022) https://sokodirectory.com/2022/04/phase-ii-of-universal-service-fund-launched-in-west-pokot/ (Accessed on 2 December 20, 2022).

95   Techweez 'CA's Phase 2 of the Universal Service Fund Goes Live in West Pokot' (2022) https://techweez.com/2022/04/14/ufs-phase-2-launched-ca/ (Accessed on December 20, 2022).

96   Techweez 'CA's Phase 2 of the Universal Service Fund Goes Live in West Pokot' (2022) https://techweez.com/2022/04/14/ufs-phase-2-launched-ca/ (Accessed on December 20, 2022).

97   Kenya News Agency 'CA To Provide Digital Connectivity To Underserved Areas' (2023) https://www.kenyanews.go.ke/ca-to-provide-digital-connectivity-to-underserved-areas/ (Accessed on December 20, 2022).

98   Draft USF Strategic Plan 2022-2026 https://www.ca.go.ke/wp-content/uploads/2022/04/Draft-USF-Strategic-Plan-2022-2026-.pdf (Accessed on December 18, 2022).

99   Draft USF Strategic Plan 2022-2026 (2022) https://www.ca.go.ke/wp-content/uploads/2022/04/Draft-USF-Strategic-Plan-2022-2026-.pdf (Accessed on December 18, 2022

100   The Kenya National Digital Master Plan 2022-2032 https://cms.icta.go.ke/sites/default/files/2022-04/Kenya%20Digital%20Masterplan%202022-2032%20Online%20Version.pdf (Accessed on December 29, 2022).

101   The Kenya National Digital Master Plan 2022-2032 https://cms.icta.go.ke/sites/default/files/2022-04/Kenya%20Digital%20Masterplan%202022-2032%20Online%20Version.pdf (Accessed on December 29, 2022).

102   The Kenya National Digital Master Plan 2022-2032 https://cms.icta.go.ke/sites/default/files/2022-04/Kenya%20Digital%20Masterplan%202022-2032%20Online%20Version.pdf (Accessed on December 29, 2022).

a "regional ICT Hub".[103] These projects include: "installation of 100,000km of high-speed fibre-optic infrastructure, establishment of 25,000 internet hotspots, establishment of cloud services, regional ICT Hubs," among others.[104]

In the Financial Year 2022-2023, the government allocated $132 million to ICTs in the national budget.[105] The allocation is to be disseminated towards the last mile connectivity network, KONZA technopolis development, digital literacy programs in the country, maintenance of NOFBI cable, and provision of connectivity for the Government's Big Four agenda among others.[106]

The government developed the National Broadband Strategy 2018-2023 which is aimed at increasing internet connectivity in the country and ensuring that every Kenyan realises the benefits brought about by internet connectivity.[107] To this end, the Strategy is divided in seven thematic areas which include infrastructure and connectivity, capacity building, regulation, privacy and security, and investment. [108]

Newly elected President, William Ruto, also has an admirable vision for digital transformation in Kenya. The President's manifesto has plans for ICTs that, if implemented diligently, could digitally transform Kenya and put it at a competitive edge globally. The president's plan includes laying 100,000kms of internet fibre during his five-year term, establishing Kenya as a software development hub where $400 million will be allocated for development of digital software for exportation, digitisation of government services, and implementation of the digital Master Plan 2022-2032.[109]

Safaricom, Kenya's leading telco, launched the 5G network in the country in October 2022.[110] In preparation for the launch, the telco commenced trials for the 5G network in March 2021 where it turned on the network in areas that were equipped and ready for the 5G network.[111] 5G stands to be beneficial as it provides internet connectivity that is "fast and reliable".[112]

103   The Kenya National Digital Master Plan 2022-2032
https://cms.icta.go.ke/sites/default/files/2022-04/Kenya%20Digital%20Masterplan%202022-2032%20Online%20Version.pdf
(Accessed on December 29, 2022).
104   The Kenya National Digital Master Plan 2022-2032
https://cms.icta.go.ke/sites/default/files/2022-04/Kenya%20Digital%20Masterplan%202022-2032%20Online%20Version.pdf
(Accessed on December 29, 2022).
105   International Trade Administration 'Kenya- Country Commercial Guide'
https://www.trade.gov/country-commercial-guides/kenya-information-communications-and-technology-ict (Accessed on 21/12/2022).
106   The National Treasury And Planning 'The Budget Summary For The Fiscal Year 2022/23 The Supporting Information'
(2022) 25 http://www.parliament.go.ke/sites/default/files/2022-04/The%20Budget%20Summary%20for%20the%20
Fiscal%20Year%202022-2023.pdf (Accessed on 21/12/2022).
107   Communications Authority of Kenya 'National Broadband Strategy 2018-2023' 9
https://www.ca.go.ke/wp-content/uploads/2020/08/National-Broadband-Strategy-2018-2023.pdf (Accessed on 21/12/2022).
108   Communications Authority of Kenya 'National Broadband Strategy 2018-2023' 9
https://www.ca.go.ke/wp-content/uploads/2020/08/National-Broadband-Strategy-2018-2023.pdf (Accessed on 21/12/2022).

109   All Africa 'Kenya: The ICT Sector Will Reap Highly From Ruto's Plan To Advance the Kenyan Digital Space' (2022)
https://allafrica.com/stories/202209200003.html (22/12/2022).
110   Standard Media 'Safaricom Launches 5G, Changes Tack As Costly Phones Hinder Uptake' (2022)
https://www.standardmedia.co.ke/business/article/2001459107/safaricom-launches-5g-changes-tack-as-costly-phones-hinder-uptake (Accessed on December 22, 2022).
111   Safaricom 'Safaricom Switches on 5G Across Kenya'
https://www.safaricom.co.ke/media-center-landing/press-releases/safaricom-switches-on-5g-across-kenya (Accessed on December 22, 2022).
112   The Kenyan WallStreet 'Safaricom Becomes First Telco to Roll Out 5G Network in Kenya' (2022) https://
kenyanwallstreet.com/safaricom-rolls-out-5g-network-in-kenya/#:~:text=Currently%2C%20Safaricom%20has%2035%20
active,the%20country%20by%20March%202023 (accessed on December 22, 2022).

Conclusion and Recommendations

Based on the above analysis, the following recommendations can be made in Kenya for enhancing access to internet connectivity and protection of digital rights:

RECOMMENDATIONS

The country's ICT regulator (CAK) should work on providing accurate data/statistics on internet use and access in the country. In doing this, the Regulator should drop the methodology applied in enumerating the number of internet users in the country, and the statistics provided by telcos on internet use. The Regulator should consider other methods such as conducting national surveys[113] which tend to give an accurate representation on internet use in the country. This will ensure that policies formulated on internet use are based on "evidence-based" facts.[114]

- CAK should work with other players such as civil society organisations and the private sector in the enumeration exercise, given their active involvement on connectivity issues and knowledge on internet use in the country. This will ensure that relevant expertise and experience is included in the enumeration exercise, and accurate data on internet use is obtained.
- The government should amend the NCIC Act and redefine hate speech. It should give it a definition that is clear, precise, and unambiguous in line with the rights and freedoms provided in the Constitution of Kenya, 2010, such as freedom of expression, and also in line with its obligations under international human rights laws.
- The Office of the Data Protection Commissioner (ODPC) should work to ensure that organisations both private and public comply with the provisions of the Data Protection Act. It should keep a close watch on the activities being undertaken by organisations that impact the data protection rights of citizens. In this case, it should draw the attention of the organisations to their obligations under the Data Protection Act as Data Controllers and Data Processors and conduct investigations on breach where necessary. Where organisations have been found to be in breach, the ODPC should issue fines to ensure compliance with the Data Protection Act.
- Private organisations and also government institutions should develop data protection policies that guide them, train personnel on handling of personal data, conduct Data Protection Impact Assessments, and regularly audit their data protection practices.[115]
- The government should be proactive and should work to ensure that its institutions provide citizens with relevant information. This will close the information gap that

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113   M.Nyambura 'The State of ICT in Kenya' (2019) 23 https://researchictafrica.net/wp/wp-content/uploads/2019/06/After-Access_The-state-of-ICT-in-Kenya.pdf (accessed on December 30, 2022)

114   M.Nyambura 'The State of ICT in Kenya' (2019) 23 https://researchictafrica.net/wp/wp-content/uploads/2019/06/After-Access_The-state-of-ICT-in-Kenya.pdf (accessed on December 30, 2022)

115   KICTANet 'Data Protection, Three Years Later - The Good, Band and the Ugly' (2022) https://www.kictanet.or.ke/data-protection-three-years-later-the-good-the-bad-and-the-ugly/ (Accessed on December 18, 2022).

RECOMMENDATIONS

enables disinformation to thrive and will ensure that citizens are fed with accurate information. It will also give citizens a reference point in cases of disinformation and deny disinformation actors from spreading fake news.

- The government should also be careful when applying disinformation laws and prosecuting individuals under the laws. In this case they should consider 'intent' and 'harm'. This helps in gauging whether an individual had an intention to misinform the public and the impact the information had on the public. It also helps in preventing unlawful prosecution. In cases of public order or national security, the government should ensure that "there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and expression".[116]

- The government should also consider international and national standards on disinformation when prosecuting disinformation cases. In this case careful examination and reasonableness should be considered when applying the exemptions provided for freedom of expression. The government should gauge whether the information amounted to "propaganda for war, incitement to violence, hate speech or advocacy for hatred".[117] In cases of elections, individuals behind disinformation should be prosecuted and jailed due to the magnitude the disinformation has on voters and the entire democratic process.

- The laws on disinformation should be properly applied and the government should ensure that their application aligns with the international standards and human rights law.

- The government in collaboration with tech platforms should train online users on how to differentiate false from factual information in online platforms.

- Social media platforms should increase effort in the reduction of bots and fake accounts in their platforms.

- The *Huduma Namba* Bill should be amended to ensure that the system is inclusive of marginalised groups in the country.

- Social media platforms should invest in tools that effectively curb disinformation, change their business practices and eliminate the financial benefits of individuals who gain from disinformation, and work on accountability in the platforms.

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116   Principle 22(5) 'The African Commission on Human and People's Rights'
https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf
117   Section 33 (2), Constitution of Kenya, 2010